No. 01-1717

Supreme Court U.S.
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IN THE

Supreme Court of the United States

JAMES E. THOMPSON,

Petitioner,

v.

ALCOA INC., UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, and UNITED STEELWORKERS LOCAL 303,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT ALCOA INC.

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Fourth Circuit properly affirmed the district court's decision to grant summary judgment in favor of Respondent Alcoa Inc. ("Alcoa") on Petitioner James E. Thompson's ("Thompson") hybrid claims under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, where Thompson failed to establish either: (a) that Alcoa violated the collective bargaining agreement; or (b) that the Union breached its duty of fair representation?

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The names of the parties to this proceeding appear on the cover.

Respondent, Alcoa Inc., formerly known as Aluminum Company of America, has no parent corporation and no publicly held company owns 10% or more of its stock.

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COUNTER STATEMENT OF THE CASE

Petitioner James E. Thompson ("Thompson") brought this case against his current employer, Respondent Alcoa Inc. ("Alcoa") and his union, the International Union, United Steelworkers of America, AFL-CIO-CLC ("International Union") and United Steelworkers Local 303 ("Local 303") (hereinafter the International Union and Local 303 will be collectively referred to as the "Union") under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 ("LMRA"). Such an action is commonly referred to as a "hybrid Section 301 case" and required Thompson to prove both that Alcoa breached the collective bargaining agreement governing working conditions at the Badin, North Carolina plant where Thompson works and that the Union breached its duty of fair representation.

The material facts pertinent to the disposition of this case were not in dispute before the district court or the appellate court. Instead, Thompson believed that the collective bargaining agreement (the "Agreement")[1] governing the terms and conditions of his employment was improperly and/or unfairly applied by Alcoa and that the Union's failure to appeal one of Thompson's grievances to arbitration was a

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1. On behalf of the plant's employees, including Thompson, the Union entered into a collective bargaining agreement with Alcoa (the "Agreement") which governs working conditions at the plant as well as established a grievance and arbitration procedure to address disputes arising out of the Agreement. At all materials times hereto, Thompson was a member of the Union and the terms and conditions of his employment at the Badin plant were embodied in the Agreement. *See* p. 120 of the Joint Appendix prepared for the United States Court of Appeals for the Fourth Circuit (hereinafter referred to as "Jt. App.")

breach of the duty of fair representation. Both the district court and the Fourth Circuit disagreed with his interpretation of the Agreement and its application to Thompson's situation. Thompson's petition describes in detail his version of the chain of events leading up to the filing of his Complaint. However, most of these facts are not necessary to a determination of the worthiness of this case for certiorari review.[2] Alcoa submits that the following facts establish both that the opinions of the Fourth Circuit and District Court in this matter are correct and that this case is not appropriate for certiorari review.

Thompson is employed at Alcoa's Badin, North Carolina plant (hereinafter referred to as the "plant" or "Badin plant"). In January 1996, Thompson was placed on sickness and accident leave ("S&A leave") when it was determined that he would be unable to perform his job's requirements. Jt. App. 231, 1179. At this time, Thompson made an oral request to be transferred to Alcoa's Point Comfort, Texas facility pursuant to the transfer provisions outlined in the Agreement.[3] Jt. App. 302-03, 647-48. Alcoa denied

2. For brevity, Alcoa incorporates by reference the Statement of Facts set forth in the decisions of the Court of Appeals for the Fourth Circuit and the district court in this matter.

3. The provision in the Agreement central to this case is found in Section 80.1 (hereinafter "Section 80") which provides in pertinent part as follows:

> 1. When, because of a disability attributable in whole or in part to his employment with the Company, it is medically indicated that an employee be removed from his job, the following shall apply:

(Cont'd)

Thompson's request because the Agreement's transfer provisions are only applicable to employees with work-related medical conditions and Alcoa did not believe Thompson's medical condition was work-related. Jt. App. 306, 1129. At this time, Thompson did not initiate the grievance procedure outlined in the Agreement to contest Alcoa's denial of his transfer request.

Approximately 18 months later, Thompson was recalled from S&A leave to the Badin plant when a position became open which was consistent with his medical restrictions. Jt. App. 569-70, 649. Less than three weeks later, on July 24, 1997, Thompson filed Grievance No. BA-1969 ("Grievance 1969") seeking a transfer to Alcoa's Point Comfort, Texas plant — the same request Alcoa denied 18 months earlier. Jt. App. 571-73. Grievance 1969 recites that the date of the alleged violation of the Agreement is July 24, 1997, the same date the grievance was initiated. Jt. App. 453. Alcoa denied Grievance 1969 on the same basis that Alcoa denied Thompson's oral request 18 months earlier, that Thompson did not suffer a work-related medical condition. Jt. App. 455-56. Also, given that Thompson was back to work at the Badin plant, Alcoa denied Grievance 1969 on the additional ground that Section 80 is not

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(Cont'd)

> a. The removed employee shall be entitled to exercise all rights under the Agreement as though he had been affected by a reduction in force. Such rights include, but are not limited to, the right to transfer to an available job in his own plant or to one in another plant if no job is available in his own plant.

Jt. App. 165.

applicable to an employee, like Thompson, who is fully employed and actually working inside the plant, regardless of whether his medical condition was work-related. Jt. App. 316-17, 458. The right to transfer was also subject to the limitation that no job be available in the employee's own plant. Jt. App. 165. Thompson himself concedes that the Agreement's transfer provisions do not apply to individuals, like himself, who are already working at the plant.[4]

On April 20, 1998, Alcoa and Thompson settled a worker's compensation claim arising out of the same medical condition that was at issue when Thompson was originally placed on S&A leave. Agreement of Final Settlement and Release ("Settlement Agreement"), Jt. App. 1042. While the Settlement Agreement recites that Alcoa accepted liability for Thompson's occupational asthma as of January 29, 1996, the Settlement Agreement specifically identifies Grievance 1969 and affords Alcoa with "its right to contest that grievance." Jt. App. 612, 1043 and 1046. Following settlement of Thompson's workers' compensation claim, the parties continued to follow the grievance procedures outlined in the Agreement regarding Grievance 1969 and Alcoa continued to deny Thompson's claims under the Agreement. Jt. App. 316-318, 457-58, 1040.[5] Following the Step Three

4. During his deposition, Thompson made the following admissions with respect to transfer rights: "[O]nce you take a job at one location, unless you get laid off, you can't transfer anywhere." Jt. App. 492. "[I]f you're working, you're not eligible [to transfer pursuant to the Agreement]." Jt. App. 530. "If you're working at Badin or at another Alcoa location, you're not eligible to turn in a transfer request." Jt. App. 530-31.

5. Alcoa believed that because Thompson was working at the Badin plant at the time he filed Grievance 1969, Section 80 did not (Cont'd)

Hearing (the final stage in the grievance procedure before arbitration), the Union considered whether to appeal Grievance 1969 to arbitration. In making the decision, the Union reviewed the record, the language of the Agreement and consulted with John Herron, who serves as the International Union's representative on the tripartite arbitration panel that hears grievances under the Agreement. Jt. App. 994 and 1003. Based upon this review, the Union believed that it would lose at arbitration and decided not to appeal Grievance 1969 to arbitration. Jt. App. 994.

REASONS FOR DENYING THE WRIT

I. The Petition Does Not Present Any Issue Appropriate For Review Under Supreme Court Rule 10 And The Writ Should Therefore Be Denied.

Supreme Court Rule 10 makes clear that review by writ of certiorari is not a matter of right but of sound judicial discretion. A petition for a writ of certiorari should be granted only in cases where there are special and important reasons for Supreme Court review. This Court has held that "'special and important reasons' imply a reach to a problem beyond the academic or the episodic." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74, 75 S. Ct. 614, 616 (1955). Further, this Court has stated that certiorari should

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(Cont'd)

afford him transfer rights. Jt. App. 316-17. Alcoa also found that Section 80 was inapplicable to Grievance 1969 because at the time Thompson initiated the grievance procedure in July 1997, there was work available at the Badin plant. Jt. App. 316-17, 1040. Finally, Thompson was told at the time of his S&A leave that Section 80 would not apply; accordingly, the time for Thompson to invoke the grievance procedure was in January 1996. Jt. App. 320-21, 340, 1040.

not be granted "except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *Id.* at 79, 75 S. Ct. at 620 (citations omitted). This case fails to present special or important reasons for Supreme Court review. To the contrary, in bringing this petition for certiorari, Thompson raises nothing new to suggest that the decisions of the Fourth Circuit or the district court were in error. Instead, Thompson makes two arguments which have nothing to do with the basis for the lower courts' decisions. First, his argument that the Fourth Circuit's decision is inconsistent with prior precedent is not borne out by the facts. Second, his claim that this case presents a split in the Circuits on an important issue is not correct. Finally, this case does not present any compelling circumstances which indicate that the Fourth Circuit Court of Appeals or the district court departed from the accepted and usual course of judicial proceedings so as to warrant review by this Court. For all of these reasons, as well as those set forth below, Thompson's petition should be denied.

A. The Petition Does Not Present A Conflict Between The Decision In This Case And Earlier Decisions Of The United States Court Of Appeals For The Fourth Circuit.

Thompson's petition alleges that the Fourth Circuit's decision in this case is inconsistent with its prior precedent in *Tobacco Workers Int. Union, Local 317 v. P. Lorillard Corp.*, 314 F. Supp. 513 (M.D.N.C. 1970), *affirmed in part, reversed in part on other grounds*, 448 F.2d 949 (4th Cir. 1971). Even a cursory review of the *Tobacco Workers* opinion demonstrates that Thompson's assertion is without merit.

Thompson cites to the Fourth Circuit opinion in *Lorillard* for the proposition that "a collective bargaining agreement calls into being the common law of the particular industry or of the particular plant." Petition at 2-3. However, the "holding" cited by Thompson and attributed to the United States Court of Appeals for the Fourth Circuit in the *Lorillard* case was only referenced by the district court in that matter. The issues before the Fourth Circuit in *Lorillard* had nothing to do with the "holding" as stated in Thompson's petition. Instead, the *Lorillard* decision involved questions of arbitrability of grievances and whether a court should determine the applicability of a laches defense or leave such determination to the arbitrator. These issues have nothing to do with the hybrid Section 301 claims in the case at bar. As a result, the decision in this case is not in conflict with that of the Fourth Circuit in *Lorillard* as argued by Petitioner.

Moreover, even assuming *arguendo* that: (1) *Lorillard* stands for the proposition asserted by Thompson; and (2) Alcoa's interpretation of the Agreement is incorrect based upon the "common law" of the Badin plant, certiorari review is still inappropriate in this case. The Fourth Circuit and district court properly held that Thompson's case failed on both prongs of the hybrid section 301 analysis, which required Thompson to establish both that Alcoa breached the Agreement and that the Union violated the duty of fair representation. Thompson's case necessarily fails as a matter of law because he cannot show that the Union breached its duty of fair representation in pursuing his grievance. Thus, whether or not Alcoa improperly applied the Agreement — which Alcoa specifically denies — Thompson cannot sustain his case. As a result, this argument is an insufficient basis to support this Court's certiorari review.

B. The Petition Does Not Present A Conflict In The Circuits On An Important Issue.

Thompson's petition next alleges that there is a split in the circuits on an important issue and that such "conflict" should be resolved by this Court. The alleged "conflict" concerns the application of Fed. R. Civ. P. 15(b) to amend pleadings to conform to evidence presented at trial. Thompson claims that the Fourth Circuit's decision in the instant case is in conflict with that of the Ninth Circuit in the case of *Galindo v. Stoody Co.*, 793 F.2d 1502 (9th Cir. 1986) and that therefore, there is a split in the circuits on an important issue. As with Thompson's first basis for certiorari review, this argument is not substantiated by the facts of this case or the law.

In *Galindo*, the Ninth Circuit affirmed the district court's amendment of the pleadings to conform to evidence presented at trial and noted the applicability of Federal Rule of Civil Procedure 15(b). *Id.* at 1512-1513. The Fourth Circuit has favorably cited to the decision in *Galindo* for the proposition that a district court may amend the pleadings under Federal Rule of Civil Procedure 15(b) to conform to evidence presented at trial. *See e.g.*, *Elmore v. Corcoran*, 913 F.2d 170, 172-73 (4th Cir. 1990) and *People for the Ethical Treatment of Animals v. Doughney*, 263 F.3d 359, 367 (4th Cir. 2001). It is therefore apparent that the Fourth Circuit recognizes the applicability of Fed. R. Civ. P. 15(b) in appropriate circumstances and that there is no actual conflict. Nevertheless, Thompson's petition asserts that the Fourth Circuit is at odds with the holding in *Galindo* based upon the decision in the case at bar.

The crux of Thompson's argument appears to be that the district court should have, *sua sponte*, amended Thompson's Complaint to add a grievance (Grievance BA-1844, hereinafter referred to as the "unpleaded grievance") which Thompson did not include in his original Complaint. However, Thompson did not complain about the district court's failure to amend the pleadings under Fed. R. Civ. P. 15(b) until his reply brief to the Fourth Circuit. Because he did not raise this issue in his opening brief, it has been waived. *See Cavallo v. Star Enter.*, 100 F.3d 1150, 1152 n.2 (4th Cir. 1996) (an issue first raised in a reply brief is not properly before a court of appeals); *Hunt v. Nuth*, 57 F.3d 1327, 1338 (4th Cir. 1995) (issues not raised in the opening brief but raised for first time in reply are waived).

However, even assuming *arguendo* that the district court erred in not amending Thompson's complaint to include the unpleaded grievance, Thompson's claim still fails as a matter of law and this Court's certiorari review should not issue. Thompson did not allege or produce evidence that Alcoa breached the Agreement with respect to the unpleaded grievance. Thus, even if the union breached its duty of fair representation with respect to its handling of the unpleaded grievance — which it did not — Thompson's hybrid section 301 claim will still fail as a matter of law because there is no evidence to suggest that Alcoa's conduct was in violation of the Agreement. Certiorari review is not appropriate on these facts where the ultimate result would be no different.

II. Certiorari Review Is Not Appropriate In This Case Where The Petition Simply Seeks This Court's Application Of Uncontested Law To Undisputed Facts.

In bringing his petition for certiorari review, Thompson does not include any new "facts" or "evidence" to suggest that the decisions of the lower courts were incorrect. Instead, Thompson would like this Court to apply uncontested law to undisputed facts and reach a different result.[6] This is not a basis for Supreme Court review and this Court should deny Thompson's petition for certiorari.

This case involves the well-established law concerning hybrid cases under Section 301 of the Labor Management Relations Act. This Court's long-standing precedent under Section 301, which has been interpreted consistently by the Fourth Circuit, governs the resolution of this case. In order to prevail on a hybrid Section 301 case an employee must prove **both**: (i) that the union breached its duty of fair representation of the employee; **and** (ii) that the employer violated the collective bargaining agreement. *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 164-65, 103 S. Ct. 2281, 2290-91 (1983). As noted by this court, because claims in a hybrid action are "inextricably interdependent," if one part of the claim fails, the other must also fail as a matter of law. *United Parcel Service, Inc.*

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6. This strategy is most evident in the final section of Thompson's petition (Petition at p.12) in which he argues that the "facts and reasonable inferences" from the evidence presented in this case demonstrate that the Union breached its duty of fair representation. Indeed, Thompson cites to the same precedent set forth by the Fourth Circuit in its published opinion for the appropriate standard of review of a Union's actions in a duty of fair representation case under Section 301 of the LMRA.

v. Mitchell, 451 U.S. 56, 67, 101 S. Ct. 1559, 1566 (1981) (Stewart, J., concurring). Accordingly, an employee "must prevail upon his unfair representation claim before he even may litigate the merits of his § 301 claim against the employer." *Id.* Here, Thompson's case failed under both prongs of the analysis. Given the well settled law in this area, this case does not present any novel issues which would warrant review by this Court.

A. The Court Of Appeals Properly Affirmed The District Court's Dismissal Of Thompson's Case Where He Failed To Establish That The Union Breached Its Duty Of Fair Representation.

The Fourth Circuit properly found that the Union had not breached its duty of fair representation in its handling of Thompson's grievances. As this Court has explained, in order to establish that a union breached its duty of fair representation, an employee must establish that the union's conduct was "arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190, 87 S. Ct. 903, 916 (1967). *See also Griffin v. Int'l Union*, 469 F.2d 181, 183 (4th Cir. 1972). Moreover, in the specific context of the union's decision to appeal a grievance to arbitration, both this Court and the Court of Appeals for the Fourth Circuit have held that the Union's decision is to be afforded considerable deference. *See Vaca*, 386 U.S. at 191-92, 195, 87 S. Ct. at 917, 919 (reflecting that the utility of grievance machinery would be undermined if an individual employee had the absolute right to compel arbitration of all grievances and holding that a breach of the duty of fair representation is not established merely by proving that underlying grievance was meritorious); *Smith v. Local 7898, United Steelworkers of America*, 834 F.2d 93, 96 (4th Cir. 1987) (duty of fair

representation not breached when union makes honest mistake or exercises poor judgment); *Ash v. United Parcel Service, Inc.*, 800 F.2d 409, 411 (4th Cir. 1986) ("[s]imple negligence, ineffectiveness or poor judgment insufficient to establish a breach of the union's duty"). After carefully analyzing the evidence presented in this case, the Fourth Circuit properly concluded that Thompson demonstrated "no facts from which we can infer that the Union, in declining to appeal the grievance to arbitration, acted arbitrarily, discriminatorily or in bad faith." Fourth Circuit Opinion, Appendix A at p. 13a. Thompson has presented no evidence to suggest that this result was in error.

B. The Court Of Appeals Properly Affirmed The District Court's Dismissal Of Thompson's Case Where He Failed To Establish That Alcoa Breached The Agreement.

The Fourth Circuit also held that Thompson failed to show that Alcoa breached the Agreement when it refused to transfer him to the Point Comfort, Texas plant. The court concurred with Alcoa's interpretation of the unambiguous transfer provisions in the Agreement as set forth in Section 80. Thompson raises nothing new to suggest that the well-reasoned decisions of the district court and the Fourth Circuit were in error on this point.[7] Accordingly, the decision of the Court of Appeals should stand.

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7. Instead, Thompson attempts to cloud the issue on this point by alleging that other employees were treated differently under Section 80. *See* Petition at 5-6. These same arguments were raised in both the district court and the appellate court and were rejected. As set forth in more detail in Alcoa's briefs to the lower courts, the individuals identified by Thompson were not similarly situated and

(Cont'd)

CONCLUSION

Because the Court of Appeals properly affirmed the District Court's decision granting summary judgment in favor of Respondent Alcoa and Thompson presents no issues worthy of this Court's certiorari review, Respondent Alcoa respectfully requests that the Petition for Certiorari review be denied in all respects.

Respectfully submitted,

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consequently, Alcoa's decisions concerning these employees have no bearing on this case. Indeed, Thompson cites no evidence to support his contention that the identified employees were similarly situated. To the contrary, the evidence establishes that a reduction in force caused the lay-off status of the identified people. Jt. App. 514-515. In contrast, Thompson admitted that his disqualification was unrelated to any reduction in force. Jt. App. 534. This distinction is critical because employees who are laid off during a reduction in force are not subject to the transfer provisions in Section 80. Jt. App. 133. In any event, the specificity of the "facts" which Thompson deems important indicates that this case is of concern only to the parties involved — not others — an additional and final reason for denying the petition for certiorari review.